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March 29, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: August 20, 2004

Case No.: TIA-0170

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

*I. Background*

**A. The Energy Employees Occupational Illness Compensation Program Act**

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the

Physician Panel Rule). The OWA was responsible for this program.<sup>1</sup>

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* §3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* §3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

## B. Procedural Background

The Applicant was employed as a process operator at the Portsmouth Gaseous Diffusion Plant (the plant). In his application, he stated that he worked at the plant for approximately six years -- from November 1954 to April 1961. He requested physician panel review of two illnesses -- prostate cancer and chronic obstructive pulmonary disorder (COPD). The OWA forwarded the application to the Physician Panel.

The Physician Panel rendered a negative determination on both illnesses. In reviewing the Applicant's prostate cancer, the Panel discussed actual and potential exposures at the plant, including an incident of uranium hexafluoride (UF6) exposure.

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<sup>1</sup> [www.eh.doe.gov/advocacy](http://www.eh.doe.gov/advocacy)

The Panel concluded that the Applicant's occupational exposures were not a factor in his prostate cancer. In considering the Applicant's COPD, the Panel cited smoking and a diagnosis of asbestosis.

The OWA accepted the Physician Panel's determinations on the illnesses. The Applicant filed the instant appeal.

In his appeal, the Applicant states that his exposures at the plant resulted in his illnesses. He cites the incident of UF6 exposure and attributes concretions in his prostate to that exposure. He also contends that UF6 and asbestos exposure at the plant caused his COPD.

## *II. Analysis*

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12.

The Applicant has not demonstrated Panel error in the prostate cancer determination. The Panel acknowledged the incident of UF6 exposure but rejected the Applicant's contention that the exposure caused concretions in the Applicant's prostate, stating that there is no medical literature to suggest that prostate concretions result from radiation exposure. The Applicant has not pointed to any part of the record that indicates Panel error concerning that statement.

Similarly, the Applicant has not demonstrated Panel error in the COPD determination. The Panel rejected radiation as a factor, citing smoking and pre-DOE asbestos exposure. The Applicant's assertion that radiation exposure contributed to his COPD is merely a disagreement with the Panel's judgment. The Applicant's assertion that asbestos exposure at DOE contributed to his COPD lacks support in the record, which did not reflect asbestos exposure at DOE.

As the foregoing indicates, the Panel based its determination on the record and provided a detailed explanation of its determinations. If the Applicant wishes DOL to consider his

assertion of asbestos exposure at the plant, he should raise the matter with DOL.

In compliance with Subpart E, these claims will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's review of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0170 be, and hereby is, denied.
- (2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: March 29, 2005